

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CHELSEA.F.,

Claimant,

Vs.

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. L 2004100630

DECISION

Stephen E. Hjelt, Administrative Law Judge of the Office of Administrative Hearings heard this matter on April 27, 2005 in San Diego, California.

Claimant was represented by her mother Valeria F.

Ron House, Attorney at Law, represented the service agency.

Evidence was received, the record was held open until May 6, 2005 for the submission of additional documents and argument. Claimant submitted additional information and the Service Agency commented on such submission in a May 3, 2005 letter. The record was closed on May 6, 2005 and the matter was submitted for decision.

ISSUE

Should the regional center's decision to deny claimant's music therapy be sustained?

FACTUAL FINDINGS

1. Claimant Chelsea F. was born March 16, 1992 and is thirteen years old. She was determined eligible for regional center services as having a condition known as Rett Syndrome or Rett Disorder.

2. Claimant seeks to receive music therapy . She has received music therapy in the past and she appears to have benefited from this intervention. Music therapy is described as a health profession in which a board certified therapist uses music events and experiences as a tool to elicit physical, cognitive, psychological, emotional, and/or behavioral outcomes. A music therapist employs a systematic process of intervention, wherein musical events and the subsequent relationships that develop through them are used as a dynamic force for addressing non-musical outcomes.

3. Claimant, as a result of Rett Syndrome, has severe developmental delay and seizure disorder. This disorder is rare and severe. It involves apparently normal development in the first 6-18 months of life and then a regression and loss of acquired skills. Claimant is non-verbal and dependent on others for all her needs. Her mother is exceptionally devoted and has been a tireless advocate.

4. Claimant receives special education in a middle school class from her local school district, Sweetwater Union School District. There is no question that she is eligible for special education services.

5. Parent has requested the school district provide music therapy. The school district denied the parents' request for music therapy. The school district apparently recognizes that music therapy may be an appropriate related service under the Individuals with Disabilities Education Act (IDEA). The school district and claimant's parents, however, disagreed over the content of the educational program and services that are necessary for claimant to receive a free and appropriate public education.

6. No determination is intended in this decision as to whether the school district's program provides claimant with a free and appropriate public education. The standards and the due process in special education are separate and apart from those considerations under a Lanterman Act (Welfare and Institutions Code section 4700 et seq.) fair hearing matter. One of the regional center's primary assertions is that music therapy is a service available under IDEA and can be offered by schools. The regional center feels strongly that claimant's local school district should take responsibility for music therapy and that regional center's purchase of claimant's music therapy constitutes a supplanting of the school district's budget.

7. The areas addressed in music therapy in the setting provided by Coast Music Therapy (the previous vendor providing Chelsea with music therapy services) may well overlap some of the areas that might be addresses by the school were it providing music therapy services as part of an IEP. However, this is not dispositive of the issue in this Fair Hearing. The reality is that the school district is not a part of this proceeding. It is an empty chair whose presence is felt by its absence. Furthermore, Special Education disputes (such as over the provision of music therapy as part of insuring a free and appropriate public education) are governed by different laws, regulations and purposes. What is clear in this case is that the San Diego Regional Center and the claimant are both acting in good faith. They simply see the facts in this case pointing in different directions.

8. The decision herein is informed by these basic facts: claimant has received music therapy services from the regional center in the past. She benefited from them. She was also receiving music therapy services from a prior elementary school district as part of her Special Education program. When she moved to a new school district (Sweetwater Union School District) the District declined to provide the services. Under these circumstances, regional center should provide the services on a time limited basis of six months, every two weeks.

9. Music Therapy is a recognized and legitimate therapeutic modality used to treat numerous conditions of those with developmental disabilities. It has some empirical support in the literature and this is sufficient to justify its use. However, in the best of all possible worlds, there would be much more rigorous scientific support for its application so that all involved; Regional Centers, Claimants and the Administrative Law Judges hearing these cases, would have more guidance.

10. The regional center has provided music therapy to certain of its clients in the past. It has also provided music therapy to claimant. The regional center feels that when a consumer reaches school age and becomes eligible for special education, the school district should be responsible for music therapy as an education-related service. The regional center even provided the family with an educational consultant to help advocate to the school district in mediation over the provision of this service. The regional center continues to believe that its funding of music therapy is supplanting the budget of this generic agency and that the parents should pursue the music therapy issue in a special education due process appeal. The parents believe that music therapy is essential to claimant's progress. However they do not feel that it is the local education's exclusive responsibility.

11. Claimant's parents have cooperated with the regional center in seeking the school district's funding for music therapy in the IEP/IPP process and in the mediation with regional center and the school. At the time of the hearing, claimant has not sought an appeal of the music therapy issue in a due process hearing against the school district but was contemplating it.

12. Part of the difficulty in cases like this is that there is an overlap in the educational goals that are generally assigned in a Special Education program in the school with those socialization and behavioral goals usually assigned in these cases involving claimants and the regional centers. The fact that there is some overlap does not mean that a claimant such as Chelsea is not entitled to music therapy services funded by the regional center. She is entitled to the supports and services that meet her unique needs and as of the close of this record, the school district had denied her request. Although made in good faith, the regional center's argument that they are the payor of last resort and that the school district has sole responsibility for providing music therapy is not persuasive. This case would be much easier to decide and probably much easier to settle in advance if the regional center and the school district were in the same courtroom so that it would be impossible to point the finger of responsibility at the empty chair. This is not meant to disparage the regional center or the position they have taken in this case. It

is obvious from years of hearing these cases that the finger pointing comes from both directions (school district and Regional Center) and that it is for the most part sincerely based on a good faith reading of the laws and regulations that control each type of case. Unfortunately, the rules and regulations for District's and Regional Centers are not the same and we end up with situations such as this one.

13. At the close of this record, claimant was taking part in choir and band at her middle school. This is certainly a good thing. However, based on a fair reading of the literature and the testimony at the hearing, this did not constitute music therapy. It was established by a preponderance of the evidence here that claimant would benefit from music therapy and that the regional center shall provide it for a time limited period that will allow claimant to benefit and then allow for a reassessment.

DETERMINATION OF ISSUE

1. The regional center's decision to deny claimant's music therapy is not sustained. The regional center asserted that claimant's needs are to be provided by the local education agency and that the music therapy should be provided by her local school district.

2. The local education agency has its own process to determine how goals and objectives are to be provided to its students eligible for special education. The Lanterman Act is sensitive to the complexity in which collaborative relationships with other agencies is established. It is not easy to clearly set boundaries that can characterize a consumer's needs into discrete categories and establish definitive roles based on whether areas of need are exclusively an educational or a regional center's duty.

3. Welfare and Institutions Code section 4646, subdivision (a) sets forth a primary directive regarding the regional center's duties and obligations relating to IPPs, community integration and costs:

“It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources. ”

4. The parameters of this “service coordination model” are set forth in Welfare and Institutions Code section 4647, subdivision (a):

“...service coordination shall include those activities necessary to implement an individual program plan, including, but not limited to, participation in the individual program plan process; assurance that the planning team considers all appropriate options for meeting each individual program plan objective; securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person's individual program plan; coordination of service and support programs; collection and dissemination of information; and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.”

5. Welfare and Institutions Code section 4501 provides that “An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community...”

6. In Welfare and Institutions Code section 4640.7, the Legislature requires the regional center to “(a)...assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community. (b) Each regional center design shall reflect the maximum cost-effectiveness possible and shall be based on a service coordination model, in which each consumer shall have a designated service coordinator who is responsible for providing or ensuring that needed services and supports are available to the consumer...”

7. The Lanterman Act in Welfare and Institutions Code section 4648, subdivision (a)(8) prohibits the use of regional center funds “to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.” Welfare and Institutions Code section 4659, subdivision (a) requires that “the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services.” The regional center obviously has tried to work with this school district. In this case, the regional center has attempted to meet claimant’s needs in a collaborative effort with claimant’s local education agency. This was consistent with one of the regional center’s fundamental duties in its case management services. The regional center was not successful in having the local school district provide for claimant’s needs with music therapy. Where the generic agency is not willing or able to provide the service sought, the regional center must provide funding for the service that is required to meet claimant’s needs as set forth in Welfare and Institutions Code sections 4501 4640.7 and 4647, subdivision (a). The regional center has exercised appropriate effort to meet claimant’s needs with generic resources. While the regional center still feels strongly about the school’s obligation and how the school could respond more collaboratively, this does not put an obligation on the family to go through the efforts of taking the generic agency to a fair hearing before it is deemed to have exhausted its administrative remedies against the generic agency. The regional center should exercise judgment to evaluate each case and the practical merits and circumstances to determine if further appeal against the generic agency might truly be fruitful. It shouldn’t be

required that futile effort be required before regional center services need to step in as the “payer of last resort.”

8. Case management and service coordination under the regional center system anticipates and relies on interagency cooperation. Welfare and Institutions Code section 4501 declares that “The complexities of providing services and supports to persons with developmental disabilities requires the coordination of services of many state departments and community agencies to ensue that no gaps occur in communication or provision of services and supports...” The San Diego Regional Center has most certainly acted in good faith and made efforts to coordinate services with the school district. However, this does not relieve it of the responsibility to provide appropriate services.

9. Claimant has met her burden to show she is entitled to receive a time limited series of music therapy sessions from a properly vendored music therapy provider such as Coast Music Therapy.

ORDER

1. Claimant’s appeal to secure provision of music therapy is granted.

2. The regional center shall provide music therapy services to claimant for a period of 6 months for one hour twice a month. It is contemplated that at the conclusion of the 6 month period case management and evaluation of the appropriateness of claimant’s needs and progress can be reassessed.

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

Dated: _____

STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings